

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

COMMITTEE TO PRESERVE THE)	
RELIGIOUS RIGHT TO ORGANIZE and)	
HOBBY LOBBY STORES, INC.,)	
Petitioners, Cross-Respondent,)	Nos. 16-2297, 16-3162, 16-3271
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
Respondent, Cross-Petitioner.)	

**UNOPPOSED MOTION FOR LEAVE TO FILE
UNOPPOSED MOTION TO INTERVENE OUT OF TIME**

Pursuant to Federal Rules of Appellate Procedure (“Rules”) 2, 25(a)(1), 26(b), 15(d), **HOBBY LOBBY STORES, INC. (“Hobby Lobby”)**, by counsel, respectfully moves the Court without opposition to grant it leave to file its Unopposed Motion to Intervene in Case No. 16-2297 out of time. (Attached hereto as Exhibit 1.) In support, Hobby Lobby states:

1. The National Labor Relations Board (“Board” or “NLRB”) issued its Order in *Hobby Lobby Stores, Inc.*, Case 20-CA-139745, 363 NLRB No. 195 on May 18, 2016 (the “Order”).

2. Hobby Lobby filed a petition for review of the NLRB’s Order on May 20, 2016, in the Fifth Circuit Court of Appeals. *See Hobby Lobby Stores, Inc. v. NLRB*, Case No. 16-60312 (5th Cir.).

3. Eleven days later, on May 31, 2016, the Committee to Preserve the Religious Right to Organize (“Committee”) filed its petition for review of the same Order in this Court. The Committee’s petition was docketed as Case No. 16-2297.

4. On June 1, 2016, the Committee filed a motion to intervene in the appeal initiated by Hobby Lobby in the Fifth Circuit. *See Hobby Lobby Stores, Inc. v. NLRB*, Case No. 16-60312 (5th Cir. June 1, 2016).

5. After filing the motion to intervene in the Fifth Circuit, counsel for the Committee asked Hobby Lobby's counsel whether Hobby Lobby intended to oppose the motion. The Committee's counsel indicated that the Committee would not oppose Hobby Lobby's motion to intervene in the Seventh Circuit appeal in exchange for an agreement to consent to its motion in the Fifth Circuit. Hobby Lobby agreed not to oppose the Committee's motion to intervene, which was granted by the Fifth Circuit on June 8, 2016.

6. On June 16, 2016, the Board moved to dismiss the Committee's petition in the Seventh Circuit for lack of appellate jurisdiction and improper venue. Case No. 16-2297, Doc. 4. The Board also asked the Court to hold the case in abeyance pending a decision on its motion to dismiss. *Id.*

7. On June 17, 2016, this Court ordered the Committee to respond to the Board's motion to dismiss by July 1, 2016. *See* Case No. 16-2297, Doc. 5. The Court further ordered that "[p]roceedings are SUSPENDED pending resolution of the motion to dismiss." *Id.*

8. The Fifth Circuit also stayed its proceedings pending this Court's decision on the motion to dismiss. *Hobby Lobby Stores, Inc. v. NLRB*, Case No. 16-60312 (5th Cir. July 7, 2016).

9. On August 3, 2016, this Court denied the Board's motion to dismiss. Case No. 16-2297, Doc. 12. The Court further ordered the Board to notify the Judicial Panel on Multidistrict Litigation that two petitions for review had been filed in different Courts of Appeals pursuant to the provisions of 28 U.S.C. § 2112(a)(3). The Court ordered the Board to notify the Court within seven days of the Judicial Panel's designating the Court of Appeals that would hear the petitions. *Id.* Finally, the Court ordered that "[p]roceedings will remain suspended pending further order." *Id.*

10. On August 15, 2016, the Board notified the Court that the Judicial Panel had randomly selected this Court in which to consolidate the pending petitions for review. Case No. 16-2297, Doc. 12.

11. Hobby Lobby's petition was transferred from the Fifth Circuit to this Court and docketed as Case Number 16-3162. The "Notice of Case Opening" provides that the Board is to file the agency record by September 21, 2016. Case No. 16-3152, Doc. 1-3.

12. On August 17, 2016, the Court ordered that the Committee's and Hobby Lobby's petitions be consolidated for purposes of briefing and disposition. Case No. 16-2297, Doc. 15. The Court further ordered that briefing will proceed pursuant to Rules 15.1 and 31 and Circuit Rule 31. Accordingly, assuming the Board files the agency record on September 21, 2016, the Committee's opening brief will not be due until October 31, 2016.

13. The Board's cross-application for enforcement was similarly consolidated with the two petitions on August 30, 2016. Case No. 16-2297, Doc. 16.

14. On September 6, 2016, Hobby Lobby filed its unopposed motion to intervene in the Committee's petition for review. Case No. 16-2297, Doc. 18. The Court denied Hobby Lobby's unopposed motion to intervene on September 12, 2016, on the ground it was untimely under Rule 15(d). Case No. 16-2297, Doc. 23.

15. Hobby Lobby now moves the Court for leave to file its unopposed motion to intervene in case number 16-2297 out of time.

16. Rule 15(d) provides that motions to intervene "must be filed within 30 days after the petition for review is filed." Fed. R. App. P. 15(d). However, this time may be extended after-the-fact for good cause. *See, e.g., Zeigler Coal Co. v. Office of Workers' Comp. Programs*, 490 F.3d 609, 611 n.1 (7th Cir. 2007) (noting the Court had granted an untimely leave to intervene). Rule 2 permits this Court, "for other good cause," to "suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." Fed. R. App. P. 2. Rule 26 provides that the Court, "[f]or good cause," may "may permit an act to be done after that time expires," except for filing notices of appeal, petitions for review, and certain other documents. Fed. R. App. P. 26(b). Rule 26(b)'s exceptions do not apply to motions to intervene. *See* 16AA Fed. Prac. & Proc. Juris. § 3961.4 (4th ed.) ("Technically, it would seem that Rule 26(b) empowers the court to extend the time to intervene under Rule 15(d), and that Rule 26(b)(2)'s ban on extensions

does not apply to Rule 15(d) intervention motions (as opposed to Rule 15(a) petitions or Rule 15(b) applications).”)

17. Hobby Lobby respectfully submits there is good cause to allow it to file its motion to intervene out of time. Because the Committee filed its petition on June 1, 2016, Hobby Lobby’s motion to intervene was due by June 30, 2016 under Rule 15(d). Hobby Lobby secured the agreement of the Committee to file its motion to intervene without opposition in early June of 2016. However, on June 17, 2016, the Court ordered that proceedings would be suspended pending a decision on the Board’s motion to dismiss the petition. Case No. 16-2297, Doc. 5. After the Board’s motion to dismiss was denied, the Court ordered on August 3, 2016, that proceedings would remain suspended pending a decision by the Judicial Panel for Multidistrict Litigation as to whether the petitions for review would be consolidated in this Court or the Fifth Circuit. Case No. 16-2297, Doc. 12. Finally, following notice from the Judicial Panel, this Court ordered on August 17, 2016, that the petitions would be consolidated and briefing would proceed. Case No. 16-2297, Doc. 15.

18. Hobby Lobby did not file a motion to intervene by June 30, 2016, because the proceedings were suspended at that time and because there was a significant possibility the Committee’s petition would either be dismissed entirely or transferred to the Fifth Circuit. Hobby Lobby also believed that should the Committee’s petition ultimately remain in the Seven Circuit, it would be able to file its motion to intervene following the decision of the Judicial Panel due to the

absence of opposition by the Committee. Accordingly, Hobby Lobby reasonably filed its motion to intervene on September 6, 2016, which was within twenty (20) days after the Court's August 17, 2016 order terminating the previously ordered suspension of these proceedings.

19. No party would be prejudiced by Hobby Lobby's intervening now, nor would such intervention interfere with any deadlines established by the Court, because no briefing has occurred. As noted above, the Committee's opening brief is not due until October 31, 2016, assuming the Board timely files the agency record.

20. Moreover, permitting Hobby Lobby's intervention would serve the interests of justice and aid this Court by allowing Hobby Lobby to file a brief in response to the Committee's petition. Hobby Lobby's opposition to the Committee's petition for review will not be completely aligned with that of the Board, and Hobby Lobby anticipates providing additional arguments and authorities in response to the Committee's petition that likely will not be provided by the Board. Hobby Lobby respectfully submits its participation as intervener will assist this Court in fully assessing the Committee's petition.

21. Finally, Hobby Lobby has a direct interest in supporting this Court's affirmation of the Board's Order to the extent the Board rejected the Committee's allegations and theories. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 208 (1965) (concluding "Congress intended to confer intervention rights upon the successful

party to the Labor Board proceedings in the court in which the unsuccessful party challenges the Board's decision").

22. The undersigned counsel for Hobby Lobby has consulted with counsel for the Board and the Committee and is authorized to state this motion is unopposed.

WHEREFORE, Hobby Lobby respectfully moves without opposition for leave to file its unopposed motion to intervene in case number 16-2297 out of time.

Dated: September 16, 2016

Respectfully Submitted

s/Christopher C. Murray

Ron Chapman, Jr.

Ogletree, Deakins, Nash, Smoak & Stewart,
P.C.

8117 Preston Road, Suite 500

Dallas, TX 75225

Phone: 214-36-9216

Facsimile: 214-987-3927

ron.chapman@ogletreedeakins.com

Christopher C. Murray

Ogletree, Deakins, Nash, Smoak & Stewart,
P.C.

111 Monument Circle, Suite 4600

Indianapolis, IN 46204

Phone: 317-916-1300

Facsimile: 317-916-9076

christopher.murray@ogletreedeakins.com

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF system on the following counsel, who is a registered CM/ECF user.

Valerie L. Collins, Attorney
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103

Linda Dreeben, Attorney
National Labor Relations Board
Office of the General Counsel
1015 Half Street, S.E., Room 8101
Washington, DC 20570-0000

Joseph F. Frankl, Attorney
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103

Elizabeth A. Heaney, Attorney
National Labor Relations Board
Office of General Counsel
1015 Half Street, S.E.
Washington, DC 20570-0000

Yasmin Macariola, Attorney
National Labor Relations Board
Region 20, Suite 400
901 Market Street
San Francisco, CA 94103

David A. Rosenfeld, Esq.
Weinberg, Roger & Rosenfeld
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-6430

s/Christopher C. Murray
Christopher C. Murray
Ogletree, Deakins, Nash, Smoak & Stewart,
P.C.
111 Monument Circle, Suite 4600
Indianapolis, IN 46204
Phone: 317-916-1300
Facsimile: 317-916-9076
christopher.murray@ogletreedeakins.com

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